86-80

No. 8680

In The Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-vs.-

JOSEPH BURGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

MAHLER & HARRIS, P.C.
STEPHEN R. MAHLER
Of Counsel
125-10 Queens Boulevard
Kew Gardens, NY 11415
(718) 268-6000
Attorneys for Respondent

Dick Bailey Printers. 203 Port Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

12pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Vehicle and Traffic Law §415-a and New York City Charter §436, authoritatively construed by the New York Court of Appeals as authorizing general warrantless searches of commercial premises by police officers to obtain evidence of criminal activity, rather than to assure compliance with a valid, comprehensive, regulatory scheme, were properly found to be violative of the constitutional protections against unreasonable searches and seizures.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 8680

In The
Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

-vs.-

JOSEPH BURGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, JOSEPH BURGER, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the New York Court of Appeals' opinion in this case. That opinion is reported at 67 N.Y.2d 338, __N.E.2d__ (1986).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the Decision Below nor the Record Raises the Question Presented in the Petition.

Petitioner phrases the question presented as whether the relevant New York statutes are violative of the Fourth Amendment to the United States Constitution "merely because the violations that the [administrative] inspection seeks to uncover for administrative purposes also con-

stitute evidence of crimes." That, however, begs the holding of the Court of Appeals.

The Court of Appeals, authoritatively construing New York Vehicle and Traffic Law §415-a and New York City Charter §436, "that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted 'administrative schemes' here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property" (7a).

Although petitioner urges that the Court of Appeals "unjustifiably determined that the statutes further no administrative purposes" (12), this Court, of course, is bound by the construction of the New York Court of Appeals. Moreover, petitioner offers no legitimate administrative purpose in any event. The "discovery of criminal evidence through inspection of *** businesses" hardly constitutes an "independent administrative objective of determining whom the Commissioner of Motor Vehicles should license to operate as a vehicle dismantler" (110). By a parity of logic, all commercial premises, of whatever sort, should be subject to random "administrative" inspection. In fact, there would be no logical reason why motorists should not be randomly stopped and their driving licenses and registration certificates examined, for there certainly is an independent "objective" of assuming that only licensed drivers operate motor vehicles, and that such vehicles are covered by liability insurance, as mandated by New York law (New York Insurance Law §3420[e]; New York Vehicle and Traffic Law §312[1][a]). Despite such "administrative" overtones, *Delaware v. Prouse,* 440 U.S. 648 (1979), rejects such an approach.

Nor did petitioner urge, or the Court of Appeals conclude, that the Fourth Amendment to the United States Constitution precluded a state from adopting *any* administrative search scheme in this area. Throughout the proceedings, and particularly in his brief to the Court of Appeals (1a-2a), petitioner urged that a carefully tailored statute would pass constitutional muster, and offered the statute at issue in *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072 (7th Cir. 1983) as illustrative. So, too, the Court of Appeals plainly indicated that the New York State Legislature was free to enact "a comprehensive regulatory scheme" which would permit administrative inspections (7a). Consequently, this case does not present the opportunity to pass upon a broad issue of public importance. Rather, all that is involved are two New York statutes which may be revised by the New York Legislature to remedy defects identified by the New York Court of Appeals and to conform to statutory provisions elsewhere.

2. The Decision Below is in Conformity with the Principles Enunciated by this Court and does not Present a Conflict of Authority nor a Significant and Recurring Issue Concerning Administrative Searches.

This Court has made it abundantly clear that the constitutional protections against unreasonable searches and seizures are applicable to commercial premises. *See, Donovan v. Dewey,* 452 U.S. 594 (1981); *Marshall v. Barlows, Inc.,* 436 U.S. 307 (1978); *See v. City of Seattle,* 397 U.S. 72 (1970). As a general rule, administrative searches can be conducted on the basis of an administrative warrant, issued on a less than probable cause standard. *Donovan v. Dewey, supra.* Certain "pervasively regulated" industries, however, may be subject to warrantless administrative inspections, where the commercial premises are part of the pervasively regulated industry and

the search itself part of a regulatory scheme designed to further an urgent state interest. *Donovan v. Dewey, supra,* at 599-600; *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). The need for warrantless inspection must be essential to the effectuating of an administrative scheme, and the inspection limited in time, place and scope by statute. *Donovan v. Dewey, supra* at 600, 602-604; *United States v. Biswell, supra* at 316; *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1076-1077, *supra.*

Assuming, for the sake of argument, that the used auto parts industry is "pervasively regulated," as did the Court of Appeals, the relevant statutes do not pass constitutional muster.[1] First, the statutes do not operate in accordance with any administrative scheme. They are designed to allow police officers to conduct warrantless searches for Penal Law violations, not to insure licensing requirements.

New York City Charter §436 explicitly permits police officers to search commercial property, at any time, "in connection with the performance of *any* police duties" (emphasis supplied). While New York Vehicle and Traffic Law §415-a does have some administrative aspects, the searches it authorizes are not related to an administrative scheme. As Police Officer Vega testified at the suppression hearing, and the Court of Appeals found, "the ensuing

1. The relevant scheme in *Biswell* involved firearms, and the scheme in question in *Colonnade Catering* involved liquor. The history of regulation of these industries is obviously quite different from that of the used auto parts industry, and it might very well be that the used auto parts industry cannot be analogized to either the firearms or the liquor industries for the purpose of administrative inspections. *Cf. Marshall v. Barlows, Inc.,* 436 U.S. 307, *supra.*

search was undertaken solely to discover whether defendant was storing stolen property on his premises," not to ascertain whether there had been compliance with any regulatory scheme (8a). Indeed, the Court of Appeals quoted petitioner's concession in its brief, "that 'the immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property' " (8a, quoting brief at 22).

Nor are these statutes carefully tailored, as required by *Donovan v. Dewey, supra.* Instead, the statutes vest police officers with "unbridled discretion" as to when, whether, where and why such warrantless searches are to take place and their frequency. New York City Charter §436, in fact, is not even limited to reasonable business hours.

The statute sustained in *Bionic Auto Parts & Sales v. Fahner,* 721 F.2d 1072, 1076, *supra,* offers a useful contrast. That statute was plainly administrative in purpose and execution. Designated representatives of the Secretary of State of Illinois (the motor vehicle licensing agent of that state) were authorized to make administrative " 'inspections *** for the purpose of reviewing records required to be maintained *** for accuracy and completeness and reviewing and examining the premises of the licensee's established place of business for determining the accuracy of the required records. Premises that may be inspected in order to determine the accuracy of the books and records required to be kept includes all premises used by the licensee to store vehicles and parts that are reflected by the required books and records . . .' ". *Ibid.,* quoting Illinois Vehicle Code §5-403(1). Inspection could be initiated while business was being conducted or work being performed, *ibid.,* quoting Illinois Vehicle Code §5-403(4), were to be limited to 24 hours in duration, *ibid.,* quoting Illinois Vehicle Code §5-403(5), and were limited to six

warrantless inspections in a six month period. *Ibid.*, quoting Illinois Vehicle Code §5-403(7). Other state statutes upheld by the state courts cited by respondent contain similar safeguards, thus rendering these cases totally inapposite and totally unpersuasive here.

The purported conflict with *United States v. Biswell,* 406 U.S. 311, *supra,* is also illusory. In *Biswell,* this Court upheld warrantless inspections of firearms dealers which wre conducted pursuant to the Gun Control Act of 1968. The inspections were conducted by administrative agents, not police officers, in order to ascertain whether there had been compliance with the licensing, record-keeping and occupational tax requirements of that statute.

In sharp contrast to *Biswell,* the statutes in this case authorize general warrantless police searches for evidence of Penal Law violations, i.e. stolen property, not to insure compliance with any administrative scheme. Neither *Biswell,* nor any other decision cited by petitioner holds that such statutes are constitutionally permissible. The Court of Appeals of New York carefully analyzed *Biswell* and recognized the distinctions which petitioner refuses to perceive (7a-8a).

CONCLUSION

This case involves two unique New York statutes which purport to authorize police officers to conduct general warrantless searches for evidence of crime, rather than in order to insure compliance with any regulatory scheme, as expressly conceded by petitioner in its Court of Appeals brief at p. 22. In accordance with the principles enunciated by this Court, the Court of Appeals of New York properly held that these statutes were unconstitutional. It left the Legislature of the State of New York free, however, to draft a more comprehensive and carefully tailored statute which would meet such objectives. Accordingly, the case does not present broad and recurring issues which would warrant review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respecfully submitted,

MAHLER & HARRIS, P.C.
STEPHEN R. MAHLER,
of Counsel